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Supreme Court, U.S.
FILED
JUN 12 1998
CLERK

No. 97-6203

**IN THE**
**SUPREME COURT OF THE UNITED STATES**
October Term, 1997

NATHANIEL JONES,

Petitioner,

*v.*

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

# BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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## QUESTIONS PRESENTED

The Anti Car Theft Act of 1992 (P.L. 102-519, 106 Stat. 3384 [Oct. 25, 1992]) created a new federal offense of armed carjacking (18 U.S.C. §2119) with enhanced penalties in the event that "serious bodily injury" (as defined in 18 U.S.C. §1365) or "death" results.

This Court granted certiorari limited to the following questions:

1. Do subsections (1)-(3) of 18 U.S.C. §2119 describe sentencing factors or elements of the offense?

2. If subsections (1)-(3) set forth sentencing factors, is the statute constitutional?

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## BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

### Interest of *Amicus Curiae*

Founded in 1958, the National Association of Criminal Defense Lawyers is one of the nation's leading organizations advancing the mission of criminal defense lawyers to ensure justice and due process for persons accused and convicted of crime. NACDL's mission, as defined in its bylaws, is to "[e]nsure justice and due process for persons accused of crime ... [f]oster the integrity, independence and expertise of the criminal defense profession ... and [p]romote the proper and fair administration of justice." NACDL has almost 10,000 members nationwide -- along with 80 state and local affiliate organizations numbering 28,000 members -- including private criminal defense lawyers, public defenders and law professors committed to preserving fairness within America's criminal justice system. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL has appeared before this Court as *amicus curiae* on many occasions. *See, e.g., Stewart v. Martinez-Villareal*, 66 U.S.L.W. 4352 (1998); *Calderon v. Thompson*, 66 U.S.L.W. 4301 (1998); *Trest v. Cain*, 118 S.Ct. 478 (1997).[1]

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1 Both parties have consented to NACDL's appearance as *amicus curiae* in this matter. No counsel for any party has authored this brief in whole or in part and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. Rule 37.6.

**Statement of the Case**

Enacted on October 25, 1992, the Anti Car Theft Act of 1992 (P.L. 102-519, 106 Stat. 3384 [1992]) created a new federal offense of armed carjacking (18 U.S.C. §2119), which provided, in pertinent part:

> Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation or attempts to do so, shall --
>
> (1) be fined under this title or imprisoned not more than 15 years, or both,
>
> (2) if serious bodily injury ... results, be fined under this title or imprisoned not more than 25 years, or both, and
>
> (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.[2]

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2 The statute has since been amended by the Violent Crime Control and Law Enforcement Act of 1994 (P.L. 103-322, 108 Stat. 1796 [1994]) by deleting the firearm possession provision and inserting in its place a specific intent element. In addition, it added the death penalty as an available sentence where death results under subsection (3). *See United States v. Arnold*, 126 F.3d 82, 85 (2d Cir. 1997); *id.* at 90 (Miner, J., dissenting), *cert. granted sub nom. Holloway v. United States*, 66 U.S.L.W. 3698 (U.S. April 27, 1998)(No. 97-7164). The instant case, however, was tried under the statute as originally enacted in 1992. *United States v. Oliver*, 60 F.3d 547, 551-54 (9th Cir. 1995).



The original Act made it a federal offense to take, or attempt to take, a motor vehicle "from the person or presence of another by force and violence or by intimidation." Federal jurisdiction lies where the carjacker possessed a firearm and took a vehicle that had "been transported, shipped, or received in interstate or foreign commerce" prior to the theft. 18 U.S.C. §2119. The legislation, as originally enacted, extended the maximum imprisonment of 15 years for armed carjacking to 25 years if "serious injury" occurs and up to life in prison if death results. 18 U.S.C. §§2119 (1), (2) & (3). (The 1994 amendments added the death penalty as an available sentence where death results under subsection (3)). The 1992 Act's other provisions double the maximum imprisonment for other auto theft crimes from five years to ten years, and also provides civil and criminal forfeiture sanction for other enumerated violations. It also provides a maximum 15 year sentence for operating a "chop shop" for stolen vehicles.[3]

Critical to this case are the sentencing specifications of subsections (1), (2) & (3) of §2119 -- *viz.* whether the specification of aggravated penalties over the base offense penalty of fifteen years (subsection 1), where "serious bodily injury" results (subsection 2)(twenty five years) or where death results (subsection 3)(life imprisonment) are properly construed

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3 A complete discussion of the legislative history of the original 1992 Act (with citations to draft bills, committee reports and the Congressional Record) may be found in F. Georgann Wing, *Putting The Brakes On Carjacking Or Accelerating It? The Anti Car Theft Act of 1992*, 28 U. Rich. L. Rev. 385 (1994); *see especially id.* at 422-29 (discussing §2119). The legislative history relevant to the 1994 amendments to §2119 is discussed in detail in Note (Michenfelder), *The Federal Carjacking Statute: To Be Or Not To Be? An Analysis Of The Propriety Of 18 U.S.C. §2119*, 39 St. Louis U. L.J. 1009 (1995); *see especially id.* at 1018-26 (discussing inherent flaws of 1992 Act as well as the potential double jeopardy consequences in the sentencing provisions of the original statute and the 1994 amendment)

as elements of the basic offense -- such that they must be formally pleaded by the government and proven at trial beyond a reasonable doubt (*see, e.g., In Re Winship*, 397 U.S. 358, 364 (1970)) or whether they are merely sentencing-enhancement provisions which are not properly elements of the crime. In that case, the "serious bodily injury" and death requirements need not be pleaded in the indictment, nor proven beyond a reasonable doubt at trial (nor, indeed, necessarily proven by evidence subject to cross-examination or admissible under the Federal Rules of Evidence). *See, e.g., Almendarez-Torres v. United States*, 118 S.Ct. 1219, 1223 (1998); *McMillan v. Pennsylvania*, 477 U.S. 79, 91 (1986); FRE 1101(d)(3).

While the courts below found the factors of "serious bodily injury" or death to be mere sentence-enhancement provisions over and above the basic offense -- and perforce not subject to the same strict due process safeguards of pleading and proof required at trial -- careful scrutiny of the statutory text as well as the overall statutory structure analyzed in the context of the companion provisions with which it is placed in the federal criminal code (Chapter 103 of Title 18, United States Code)(§§2213-19) clearly indicate that "serious bodily injury" and death are properly viewed as substantive elements of armed carjacking and, as such, are subject to the same constitutional requirements of pleading and proof as are all core elements of criminal offenses as enacted by Congress. To the extent that Congress' intent is deemed unclear or should the contested provisions be deemed mere sentence enhancers, they are nonetheless unconstitutional under *Winship* and its progeny for attempting to evade constitutional prescriptions by classifying necessary elements of a criminal offense as mere sentencing provisions in order to evade the requisite high constitutional burden of proof beyond reasonable doubt.



## SUMMARY OF ARGUMENT

1. The federal armed carjacking statute -- 18 U.S.C. §2119 -- provides a penalty of fifteen years imprisonment for the basic offense (subsection 1), which increases to twenty five years in the event of "serious bodily injury" (subsection 2) as well as life imprisonment in the event of death (subsection 3). The statutory language is ambiguous and provides no clear-cut guidance as to whether the bodily injury/death provisions are aggravating elements of the basic substantive offense -- which must be pleaded and proven at trial -- or are mere sentence-enhancers, which need not be the subject of proof at trial. The legislative history provides no assistance in clarifying the ambiguity of the statutory text. However, analogous criminal provisions within the same statutory chapter suggest that the provisions should be treated as aggravating elements of the basic statutory offenses, which must be pleaded and proven at trial.

2. The rule of lenity provides that all ambiguities with respect to the ambit of criminal statutes are to be resolved in favor of the accused. These include ambiguities with respect to penalties as well as the substantive context of penal statutes. That would be the appropriate course in this case, where Congressional intent cannot remotely be discerned.

3. In the event these aggravating factors are deemed sentence-enhancers, rather than elements of the offense, serious constitutional problems are presented where sentence-enhancement factors may be utilized to impose sentences in excess of the statutory maximum permissible for the base offense. In order to avoid potential constitutional problems, the aggravating factors should be construed as elements of the substantive offense of armed carjacking, not mere sentence-enhancement provisions.

## ARGUMENT

### I

### THE REQUIREMENTS OF "SERIOUS BODILY INJURY" AND "DEATH" CONTAINED IN §§2119(2) & (3) ARE ELEMENTS OF THE UNDERLYING ARMED CARJACKING OFFENSE (§2119(1)), NOT MERE SENTENCE-ENHANCEMENT FACTORS, AND ARE THUS SUBJECT TO THE CONSTITUTIONAL REQUIREMENTS OF NOTICE IN THE INDICTMENT AND PROOF BEYOND REASONABLE DOUBT AT TRIAL

Analysis of Congress' federalization of the offense of armed carjacking indicates that it has created a statute in which the base offense -- carjacking of a vehicle in interstate commerce by force and violence or intimidation while in possession of a firearm -- is ordinarily subject to a penalty of fifteen years' imprisonment. 18 U.S.C. §2119(1). In the event that "serious bodily injury" results, the penalty rises to twenty five years' imprisonment. §2119(2). In the event of death, the penalty goes up to life imprisonment (since amended to include the option of death). §2119(3).

The crucial question here is one of Congressional intent and the constitutional implications of its decisions in setting forth the elements of penal statutes. Did Congress intend that the "serious bodily injury" and death provisions contained in subsections (2) and (3) of the statute to be (aggravating) substantive elements of the underlying armed carjacking offense (subsection (1)) -- in which case they would would required to be pleaded in the indictment and proven beyond reasonable doubt at trial -- or are they merely sentence-enhancement



factors, applicable only in the event of conviction of the underlying offense, in which case they need never be presented to the jury or subject to the standard of proof beyond reasonable doubt? *See Almendarez-Torres v. United States*, 118 S.Ct. 1219 (1998); *McMillan v. Pennsylvania*, 477 U.S. 79 (1986).

The distinction is critical. An indictment must set forth each element of the crime charged. *Hamling v. United States*, 418 U.S. 87, 117 (1974). But an indictment need not set forth factors relevant only to the sentencing of an accused -- nor need it prove those factors beyond reasonable doubt at trial. *Almendarez-Torres*, 118 S.Ct. at 1223. Within limits (*McMillan*, 477 U.S. at 84-91), the question of which factors are which is normally a matter for Congress. *See Staples v. United States*, 511 U.S. 600, 604 (1994)(definition of a criminal offense entrusted to the legislature, "particularly in the case of federal crimes which are solely creatures of statute")(quoting *Liparota v. United States*, 471 U.S. 419, 424 (1985)).

Accordingly, in assessing the reach of a federal criminal statute, the Court must pay close heed to statutory language, legislative history and purpose in order strictly to determine the scope of conduct the act forbids. *Dowling v. United States*, 437 U.S. 207, 213 (1985). Due respect for the prerogatives of Congress in defining federal crimes prompts restraint in this area, where a "narrow interpretation" is typically appropriate. *Id.* Thus, "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that it clear and definite." *Id.* at 214 (quoting *Williams v. United States*, 458 U.S. 279, 290 (1982), quoting *United States v. Bass*, 404 U.S. 336, 347 (1971), quoting *United States v. C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952)).

These interpretive rules are particularly apposite here, where the Court is construing the sentencing provisions of a penal statute, whose analysis must be informed by the "rule of lenity". *Bifulco v. United States*, 447 U.S. 381, 387 (1980); *Simpson v. United States*, 435 U.S. 6, 14-15 (1978). In prior cases the Court has made it clear that this principle of statutory construction applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose. *United States v. Batchelder*, 442 U.S. 114, 121 (1979). As the rule was stated in *Ladner v. United States*, 358 U.S. 169, 178 (1958): "This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *See also Whalen v. United States*, 445 U.S. 684, 695 n.10 (1980); *Bifulco*, 447 U.S. at 387; *Simpson*, 435 U.S. at 14-15.

As will become clear upon close analysis, the statutory text and structure of §§2119 (1), (2) & (3) is altogether ambiguous as to whether the "serious bodily injury" and death components were intended by Congress to be elements of the offense or mere sentence-enhancement factors. That fatal ambiguity is in no way clarified by consideration of the statute's legislative history, which deals with the new armed carjacking provision only in passing, devoting its principal attention to legislative efforts to outlaw illegal "chop shop" activities and to increase penalties for pre-existing auto theft crimes. As will be seen, the creation of an altogether new federal crime of armed carjacking was entirely peripheral to Congress' presumed "collective legislative intent" (as manifested in the printed committee reports and legislative markups).

Nevertheless, consideration of §2119 within the context of its placement in Chapter 103 of Title 18, United States Code



("Robbery and Burglary")(18 U.S.C. §§2211-19) suggests that whenever assault, physical injury or death are the incidental results of the underlying theft activities proscribed in that chapter -- *compare* §§2113(d) & (e) *with* §§2119(2) & (3) -- the assaultive or homicidal behavior is treated as an additional element of the underlying theft offense, which must be pleaded and proven at trial before it may be used as an enhanced penalty at sentencing. *See* E. Devitt, C. Blackmar, K. O'Malley, *Federal Jury Practice and Instructions* §49A.02 (1997 Supp.)("The carjacking statute has been patterned after the other federal robbery statutes (18 U.S.C.A. §§2111, 2113 and 2118)" and was enacted in 1992 to protect car owners from violent crime)(quoting H.R. Rep. No. 851(I), 102nd Cong., 2nd Sess. at 17, 1992 U.S.C.C.A.N. 2829, 2834).

**A. The Statutory Text of §2119 and Its Legislative History**

The statutory text of §2119(1)-(3), as well as its legislative history, provide no definitive guidance as to whether Congress intended "serious bodily injury" or death to serve as additional aggravating elements of the crime of armed carjacking or mere sentence-enhancement features that need not be pleaded or proven at trial.

In the first place, neither the statutory language itself nor its placement within the body of the text provides any clue as to Congress' intentions in this regard. *Compare McMillan*, 477 U.S. at 81 n.1. Nor have the serious bodily injury and death provisions been placed in a statutory subject-matter title expressly addressed to penalty or sentencing. *Compare* 18 U.S.C. §111. Nor, for that matter, does the statute set forth the elements of the offense and the penalties therefor in separate subsections. *Compare* 8 U.S.C. §1324(b)(iii).

Indeed, Congress has been singularly inconsistent in its

statutory draftsmanship as far as providing explicit indications whether the injury or death provisions are elements of the offense or sentence-enhancement factors. In some statutes, serious bodily injury is set forth in the definition of the crime. *Compare* 18 U.S.C. §1091. In other statutes, the injury factor is set forth in both the definition of the crime and repeated in the penalty provision. *Compare* 18 U.S.C. §1959. In still other statutes, the injury factor is set forth in subsections entitled "Penalties" (21 U.S.C. §841(b)), "Aggravated Offense" (18 U.S.C. §43(b)), or "Enhanced Penalties" (18 U.S.C. §111(b)). Thus, the structure of any particular federal statute -- including §2119 -- provides little consistent guidance as to whether in any particular statute, Congress intended the injury or death element to be part and parcel of the offense -- with all the attendant constitutional protections appertaining thereto -- or a mere sentence enhancer.

Nor is the legislative history any more informative on this specific point. With the Anti Car Theft Act of 1992, Congress hoped that the codification of a new federal crime of armed carjacking, new forfeiture remedies against auto thieves and increased penalties for pre-existing federal crimes related to auto theft would give federal law enforcement agencies greater greater flexibility in dealing with the growing national problem of auto theft. H.R. Rep. No. 102-851(I) at 16, 1992 U.S.C.C.A.N. at 2832. "The majority of the legislative history behind the Act's enactment, however, focuses on a comprehensive plan for taking the profit out of car theft rather than thoughtful reasoning behind the creation of the federal crime of 'armed carjacking'". Michenfelder, 39 St. Louis U. L.J. at 1015 & n.47.

In this respect, the Act devotes most of its attention to stopping three profiteering methods of auto theft wholly unrelated to armed carjacking. In particular, Congress



concerned itself primarily with improving the parts-marking program so that "chop shops" could be abolished, establishing a national system for recording title documents so that "title washing" could be prevented, and tightening Customs Service enforcement against stolen car exporters. 1992 U.S.C.C.A.N. at 2930-31; Wing, 28 U. Rich. L. Rev. at 410-22 (discussing background behind these provisions as well as the sparse mention of armed carjacking during the legislative debates).[4]

The legislative history, however, is otherwise silent with respect to the substantive or penalty provisions for the armed carjacking statute. The only mention of note consists of a simple reference to the fact that while the original bill (H.R. 4542) created a crime of armed carjacking with a sole penalty provision mandating 15 years in prison, the final legislation reported out by the conference committee had, without explanation, changed the penalties to those that are contained in the present statute: 15 years for the base offense; 25 years in the event of "serious bodily injury"; and life imprisonment in the event that death resulted. *See* Wing, 28 U. Rich. L. Rev. at 415-16, 422-28 (collecting citations from various bills and discussions in Congressional Record relevant to the carjacking provisions).

**B. §2119 in the Context of Chapter 103, Title 18, U.S.C.**

When Congress enacted the armed carjacking statute in 1992, it placed it within Chapter 103 of Title 18 of the United States Code, a chapter entitled "Robbery and Burglary". This

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4 In particular, the Act doubles the maximum imprisonment terms for other auto theft crimes from five years to ten years (18 U.S.C. §553(a); 18 U.S.C. §2312; and 18 U.S.C. §2313(a)) and provides civil and criminal forfeiture sanctions for enumerated violations (18 U.S.C. §§981(a)(1)(F), 981(a)(5) & 982 (a)(5)).

chapter deals with such offenses as "Bank robbery and incidental crimes" (18 U.S.C. §2113), "Mail, money or other property of United States" (§2114) and "Robbery and burglaries involving controlled substances" (§2118).

In each of the relevant statutes under Chapter 103, the principal elements relate to theft offenses. Significantly, however, where "assault", "serious" or "significant" bodily injury or "death" occurs incidental to the theft offense, each statute provides that injury or death is an aggravating element of the underlying theft offense, which must be pleaded and proven at trial, and for which harsher sentencing penalties are imposed over and above the original theft offense. *See, e.g., Simpson v. United States*, 435 U.S. 6, 14 (1978); *United States v. Gaddis*, 424 U.S. 544, 547-48 (1976); *Prince v. United States*, 352 U.S. 322, 325 (1957); *United States v. Grimes*, 607 F.2d 6, 12-14 (2d Cir. 1979); *United States v. Sappe*, 898 F.2d 878, 880-81 (2d Cir. 1990)(violations of simple bank robbery and aggravated bank robbery "did not constitute separate offenses but were simply variations of a single offense graded according to the existence and nature of aggravating circumstances"). *See also O'Clair v. United States*, 470 F.2d 1199, 1202 (1st Cir. 1972)("[i]t seems evident ... that Congress intended to create one offense, bank robbery, which was to receive one punishment, its severity determined by the nature of its accompanying aggravating circumstances"); *United States v. Willis*, 102 F.3d 1078, 1082 (10th Cir. 1996)(§2113[d], involving aggravated penalty where bank robbery included assault or placing life in jeopardy, is a substantive crime, not a mere sentence enhancement).

Comparison of §2119(1), (2) & (3) with the parallel provisions of its companion bank robbery statute (§2113(a), (b), (d) & (e)) is instructive in this regard. §2113(d) provides that whoever, in the course of committing bank robbery, assaults or



places in jeopardy the life of any person by use of a dangerous weapon, is subject to an aggravated penalty of twenty five years' imprisonment. Similarly, §2113(e) provides that where death or kidnapping occur during the course of the underlying bank robbery offense, the aggravated penalty rises to a mandatory minimum ten year sentence up to life imprisonment or death. *See Green v. United States*, 365 U.S. 301, 303 (1961)(§2113(a) is "the same offense [as §2113(d)] without the elements of aggravation"); *United States v. Evans*, 665 F.2d 54, 55 (2d Cir. 1981)("a conviction of the lesser, included offense of unarmed bank robbery, §2113(a), must be merged into a conviction of armed bank robbery, §2113(d), when both convictions arise from a single criminal act * * * In short, to violate §2113(d), a fortiori, an individual commits an offense under either subsection (a) or (b)").[5]

The same principles should apply to §2119. The basic core offense of armed carjacking calls for a base penalty of fifteen years imprisonment. §2119(1). Where the *aggravating* factor of "serious bodily injury" occurs incident to the base offense, the penalty rises to twenty five years. §2119(2). When death results, the penalty rises yet again to life imprisonment

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5 *See also* §2114(a)(assaulting any person in custody of mail or money of the United States in the course of theft carries ten year penalty; where person is wounded or life placed in jeopardy by use of dangerous weapon, penalty is twenty five years); §2118(c)(1) & (2)(assaulting or placing life in jeopardy during course of robbery calls for enhanced penalty of twenty five years; where death results, the penalty is any term of years up to life imprisonment).

Under each of these statutes, the assault, injury or death component is deemed an aggravating element of the basic theft offense, which must also be pleaded and proved at trial. *See Holiday v. Johnston*, 313 U.S. 342, 349 (1941)(the predecessor to the current statutes "does not create two separate crimes but prescribes alternative sentences for the same crime depending upon the manner of its perpetration").

(and, as recently amended, to death). §2119(3). Accordingly, much like the analogous bank robbery statute, the degree of punishment for armed carjacking rises to the extent either of two aggravating factors is proven -- serious bodily injury or death. Thus, much like greater and lesser included offenses, armed carjacking consists of one unitary offense whose punishment is based upon the presence (or absence) of two particular aggravating factors. *See Grimes*, 607 F.2d at 12-14.

That the aggravating factors in question -- serious bodily injury or death during the course of a carjacking -- relate to offense characteristics, rather than offender characteristics, further militates in favor of construing §2119 (2) & (3)'s aggravators as elements of the offense, rather than mere sentence enhancers. *See, e.g.*, Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 Stan. L. Rev. 681, 706-07, 719-24 & nn.183-203 (1983)("The most significant elements of an offense definition ... are the [attendant] circumstance and result elements * * * [result is a] circumstance changed by the actor"); *see also* 1 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* §3.11(e)(1986)(Concurrence of Mental Fault and Results -- Difference as to Degree of Harm).

Certainly, under recently-amended §2119(3), where the death penalty may now be imposed in the event that death occurs in the course of the underlying carjacking, it is axiomatic that proof of death having resulted is a critical and necessary element of the offense, which must be proven to, and found by, the jury beyond reasonable doubt. *See United States v. Edmonds*, 80 F.3d 810, 817 n.7 (3d Cir. 1996)(*en banc*)("Congress determines 'elements' and hence, what facts require unanimous jury agreement, every time it passes a criminal statute. For example, we would not allow a conviction to stand for murder under 18 U.S.C. §1111 without unanimous



agreement that someone was killed. Congress has made the unlawful killing of a human being an 'element' for which unanimity is required").

Accordingly, if death is a necessary element that must be proven beyond reasonable doubt under recently-amended §2119(3) before a death sentence may be imposed -- as undoubtedly it must -- Congress has certainly given no indication that it intended the "serious bodily injury" provision of subsection (2) to be treated any differently than the death provision of subsection (3). *See, e.g., United States v. Michael*, 10 F.3d 838, 842 (D.C. Cir. 1993)("we are reluctant to infer ... classification [as a penalty enhancement] in the absence of a reasonably clear statement from Congress, at least for a fact embedded in the statutory section defining the crime and closely related to the circumstances of the crime"); *United States v. Rezaq*, 134 F.3d 1121, 1136 (D.C. Cir. 1998)("The fact that a death resulted from a highjacking is 'closely related' to the circumstances of the highjacking; indeed, this fact will ordinarily be admissible at trial, to prove that defendant used force or intimidation in committing the crime. (Citation omitted). As to the statute's structure, we have found that Congress did not clearly demarcate factors related to guilt from those related to punishment in drafting [the statute. This] militates against the penalty-enhancement reading").

**C. The Rule of Lenity in the Face of Congressional Ambiguity**

Where we are faced with a criminal statute whose text is seriously ambiguous on its face as to whether the bodily injury/death factors are intended as elements of the offense or mere sentence enhancers -- and where the legislative history sheds no further light one way or the other on the question -- this Court must apply the rule of lenity to this penal statute and

resolve the ambiguity in petitioner's favor. *See Granderson v. United States*, 511 U.S. 39, 42-43 (1994)("[W]e rest on the principle that 'the Court will not interpret a federal criminal statute so as to increase the penalty ... when such an interpretation can be based on no more than a guess as to what Congress intended'")(quoting *Bifulco*, 447 U.S. at 387, and *Ladner*, 358 U.S. at 178); *see also Simpson*, 435 U.S. at 14-15.

Here, there can be no question as to the ambiguity of the statutory text. There is no clear demarcation between offense and penalty elements. Moreover, comparison of the carjacking statute with the inconsistent manner in which Congress has drafted the offense and penalty provisions of other penal statutes provides no clear and convincing guidance as to what it had on its collective mind in this case. Certainly, the legislative history provides no additional enlightenment as to Congress' intentions. To be sure, the rule of lenity may not be used to create an ambiguity where none exists on the face of the statutory text. *See United States v. R.L.C.*, 503 U.S. 291, 305-06 (1992). Nonetheless, "[w]here it is doubtful whether the text includes the penalty, the penalty ought not to be imposed". *Id.* at 309 (Scalia, J., joined by Kennedy & Thomas, JJ., concurring in part and concurring in the judgment).

## II

## "SERIOUS BODILY INJURY" AND "DEATH" MUST BE PLEADED IN THE INDICTMENT AND PROVEN AT TRIAL BEFORE A SENTENCE IN EXCESS OF FIFTEEN YEARS MAY BE CONSTITUTIONALLY IMPOSED UNDER §2119

In the event that this Court concludes that "serious bodily injury" and "death" are not elements of the offense of



armed carjacking, but, rather, are mere sentence-enhancement factors which need not be pleaded or proven beyond reasonable doubt at trial, it then faces a serious constitutional conundrum -- whether, and to what extent, Congress may circumvent constitutional requirements of pleading and proof in the drafting and formulation of criminal statutes. *Compare Mullaney v. Wilbur*, 421 U.S. 684, 689 (1975) *with Patterson v. New York*, 432 U.S. 197 (1977).

In this case, §2119(1) sets forth a maximum sentence of fifteen years for the core offense of armed carjacking. In the event that "serious bodily injury" occurs during the course of the crime, a sentence of twenty five years may be imposed. §2119(2). In the event death results, the sentence may be life imprisonment (or, as recently amended, death). §2119(3). May Congress circumvent the due process clause by allowing courts to impose sentence that far exceed the statutory maximum allowed for the offense of conviction on the basis of additional crime-related (or offender-related) factors the government was not required to plead or prove at trial? Notwithstanding *McMillan v. Pennsylvania*, 477 U.S. at 86, the answer is still no.

While *McMillan* did not find constitutional fault with a state sentencing scheme which allowed for the consideration of offense-related factors not required to be proven at trial -- in that case, gun possession during the offense -- the Court nonetheless stopped short of endorsing sentence-enhancement that exceeded the statutory maximum permissible for the offense of conviction on the basis of factors not submitted to the jury or proven beyond reasonable doubt. 477 U.S. at 86-87. Within the statutory maximum provided by the legislature for the particular offense for which a defendant is convicted, this Court has given the sentencing courts broad discretion in the consideration of extrinsic offense-related and offender-related

information not presented during the course of the criminal trial. *See, e.g.*, Kevin R. Reitz, *Sentencing Facts: Travesties of Real Offense Sentencing*, 45 Stan. L. Rev. 523, 543-50 (1993); Elizabeth T. Lear, *Is Conviction Irrelevant?*, 40 UCLA L. Rev. 1179, 1185, 1213-22 (1993).

Where the sentence imposed exceeds the statutory maximum permissible for the offense of conviction, however, due process concerns must inform the process. There are constitutional limits imposed on the ability of any legislature, including Congress, to circumvent the Constitution by declaring an offense-related fact to be treated as a mere sentence-enhancer which need not be pleaded or proven at trial and by which the sentence ultimately imposed may be far in excess of that of the offense of which the defendant was legally convicted. *See especially* Susan N. Herman, *The Tail That Wagged The Dog: Bifurcated Fact-Finding Under The Federal Sentencing Guidelines And The Limits Of Due Process*, 66 S.Cal. L. Rev. 289, 293, 316-41 (1992).

Here, if treated as sentence-enhancement factors, the serious bodily injury and death factors allow the trial court to impose sentences far in excess of the statutory maximum sentence permissible for the base offense -- fifteen years -- on the basis of evidence which need not be presented to the jury nor proven beyond reasonable doubt. Because these aggravating factors are never presented to the jury and full confrontation rights are dubious at sentencing, the defendant's right to procedural due process in the context of his sentencing is seriously compromised. *See Meachum v. Fano*, 427 U.S. 215 (1976); *Specht v. Patterson*, 386 U.S. 605 (1967).

In this case, treating the "serious bodily injury" factor as a mere sentence-enhancement device has allowed the sentencing court to impose a sentence ten years in excess of the maximum



sentence of the only offense of which he was found guilty beyond reasonable doubt -- simple carjacking. He received a sentence of twenty five years imprisonment under §2119(2) rather than the fifteen year maximum permissible under §2119(1) despite the fact that the prosecution was relieved of the obligation of proving serious bodily injury beyond reasonable doubt. To treat these aggravating factors as mere sentence-enhancers thus allows the courts to impose sentences far in excess of the statutory maximum permissible for the offense of conviction without the appropriate procedural protections to safeguard the accuracy of the process. Herman, 66 S.Cal. at 333-35.

Given the serious constitutional implications raised by allowing sentencing in excess of the statutory maximum, it is appropriate to return to first principles. "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909); *Almendarez-Torres*, 118 S.Ct. at 1234 (Scalia, J., joined by Stevens, Souter & Ginsburg, JJ., dissenting). In this case, declaring serious bodily injury and death to be elements of the offense -- much like the analogous bank robbery statutes -- rather than mere sentence-enhancers, would neatly avoid the controversy.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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Dated: June 1998